IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13/02/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.585 of 1987

K.Venkatachalam .. Appellant

-Vs-

1. V.Ranganathan
2. Boopalan .. Respondents

This appeal has been preferred under S.96 of The Code of Civil procedure against the judgment and decree of the III Additional Subordinate Judge, Coimbatore made in O.S.No.675 of 1982 and dated 6.4.1987.

!For Appellant : Mr.M.B.Dominique

^For Respondents : Mr.R.Gandhi,
Senior Counsel
for Mr.M.Kandasamy

:JUDGMENT

M.CHOCKALINGAM, J.
The second defendant is the appellant herein.
2. This appeal has arisen from the judgment of the learned III Additional Subordinate Judge, Coimbatore granting a decree in favour of the first respondent/plaintiff.
3. The first respondent herein filed a suit for a direction to the defendants to execute and register the sale deed in favour of the plaintiff and in case of failure to do so, for execution and registration of the sale deed by the Court on their behalf, and for a direction to the 2nd defendant personally and defendants 4 to 6 out of the estate of the first defendant to pay the plaintiff a sum of Rs.9,924.50 with future interest with the following averments. The land in S.Nos.5 60/1 and 560/2 in Telungupalayam Village, Coimbatore Taluk belonged to the defendants 1 and 2. They formed a layout therein, and the same was approved by the Deputy Director of Town Planning and Coimbatore Municipality in 1975. An agreement was entered into between the plaintiff and the defendants 1 and 2 on 25.12.1977, by which the defendants 1 and 2 agreed to sell site Nos.1 and 2 admeasuring 11 cents 33 sq.ft. and 18 cents 278 sq.ft. respectively to the plaintiff. The plaintiff paid Rs.5,000/- as advance. The plaintiff was always ready and willing to perform

his part of the contract. On 23.11.1979, the second defendant received a sum of Rs.20,000/- from the plaintiff and endorsed the same on the agreement. The defendants 1 and 2 earlier entered into an agreement with late K.T.Subramaniam Chettiar on 18.9.1974 for sale of some of the sites to him and received Rs.10,000/- from him. After the death of Subramaniam, when his son S.Thyagarajan agreed to receive back the advance, the defendants 1 and 2 directed the plaintiff to pay the said sum agreeing to treat the sum as part of sale consideration. Accordingly, on 30.11.1979 the plaintiff paid Rs.10,000/- to Thiyagarajan. Thus, the plaintiff paid a total sum of Rs.35 ,000/- to the defendants 1 and 2. The defendants 1 and 2 sold site No.6 to a third party. The plaintiff is confining his claim to site No.1 only. The value of site No.1 measuring 11 cents 33 sq.ft. is Rs.27,690/-. Since the plaintiff has paid Rs.35,000/-, there is an over payment of Rs.7,310/- which the defendants 1 and 2 are liable to refund. Thus, the plaintiff has fully paid the sale consideration in respect of site No.1. The defendants 1 and 2 have been postponing execution of the sale deed. The plaintiff is willing to bear the expenses of execution and registration of the sale deed. The plaintiff came to know that the defendants 1 and 2 have fraudulently created a settlement deed dated 23.6.1980 in favour of their sister, the third defendant. The plaintiff has taken possession of the suit property. Even according to the settlement deed, the third defendant is only a subsequent transferee with notice and without consideration and is bound by the contract in favour of the plaintiff. The plaintiff is entitled to get interest on Rs.7,310/- at 12% per annum from 30.11.1979. The attitude and conduct of the defendants constrained the plaintiff to file the suit. The first defendant died on 22.10.1984, and hence, the defendants 4 to 6 are impleaded as his legal representatives.

4. The suit was contested by the defendants 1, 2, 3 and 5 by filing written statements. The defendants 4 and 6 were set exparte. The defendants 1 and 2 contended that as per the agreement, if there is failure on the part of the plaintiff to obtain the sale in respect of the suit properties within two years, the agreement will stand cancelled; that the plaintiff was neither ready nor willing to perform his part of the contract. The plaintiff entered into an agreement with one Subramaniam for sale of site No.6 of the suit property for higher price. He represented to the 2nd defendant that he would secure Rs.47,000/- from Subramaniam and retain Rs.35,000/- paid by him; that the 2 nd defendant out of faith and confidence on him agreed to the said course; that the defendants received only a sum of Rs.12,000/- from the plaintiff on behalf of Subramaniam; that a perusal of the sale deed in favour of Subramaniam would reveal that only at the instance of the plaintiff, the defendants executed the sale; that it is false to state that the plaintiff has not paid Rs.10,000/- to Thyagarajan on 30.11.79; that the suit agreement is no longer in force, and it has become unenforceable; that the possession was always with the defendants; that the plaintiff fully knew about the settlement; that the settlement is valid in law; that the plaintiff is not entitled to refund of Rs.9,924.50, and hence, the suit may be dismissed with exemplary costs.

5. The third defendant averred that she is the sister of the defendants 1 and 2; that she is not married; that the defendants 1 to 3 were living together in the family house at No.31/79 Marakara Nanjappa Gounder

Street, Coimbatore 1; that her mother Konammal wanted to give a share in her properties to the third defendant; that she executed a Will on 21.11.1948 in a sound and disposing state of mind, when she directed that the defendants should share the property equally; that apprehending that the defendants 1 and 2 have created some records against her interest, the third defendant filed a suit for partition of the properties of Konammal in O.S.78/77 on the file of Sub Court, Coimbatore; that while the said suit was pending, the defendants 1 and 2 came forward with a family arrangement and agreed to execute settlement in respect of the suit property in her favour, and accordingly, they executed the suit property viz. 11 cents and 33 sq.ft. in her favour on 23.6.1980; that she was put in possession of the said site; that there is no such agreement for sale as alleged by the plaintiff; that it is false to state that the plaintiff has paid Rs.35,000/-; that the plaintiff has no right in the suit properties, and he is not entitled to make a claim for specific performance of the alleged agreement, and hence, the suit was to be dismissed.

6. The fifth defendant interalia stated that the plaintiff is not in possession of the suit property; that time is the essence of the contract; that the plaintiff was never ready and willing to perform his part; that even the second defendant received any amount, the same will not bind him; that the alleged payment to Thiagarajan will not bind him; that there is no over payment as alleged by the plaintiff, and thus, no amount is liable to be refunded; that the suit is barred by limitation; that the suit is bad for nonjoinder of necessary parties; that the plaintiff is not entitled for any refund, and hence, the suit is liable to be dismissed with costs.

7. On the above pleadings, the trial Court framed as many as nine issues, tried the suit and decreed the same. Aggrieved second defendant has brought forth this appeal.

8. Arguing for the appellant/second defendant, the learned Counsel would submit that the trial Court has not considered the pleadings of the parties and the evidence adduced by them, but has considered the extraneous, irrelevant and unwarranted matters; that it is pertinent to note that as per Ex.A1 agreement, in case o f the plaintiff's failure to obtain the sale on payment within the stipulated period of two years ending 25.12.1979, the agreement stood cancelled; that it is admitted by P.W.1 in evidence that the defendants 1 and 2 were in a state of readiness to execute the sale deed within two years period; that the trial Court failed to bear in mind the averment in para 8 of the plaint that the plaintiff was not claiming any relief in respect of the sale of site No.6 to a third party and he was continuing the suit to site No.1 only; that the plaintiff did not at any time set up any plea that the sale consideration of Rs.47,000/- under Ex.B1 was to be treated as the amount paid by him to the defendants 1 and 2 and that he had paid the latter a total sum of Rs.82,000/- representing Rs.35,000/- and Rs.47,000/-; that the trial Court went wrong in finding that the defendants 1 and 2 received Rs.47,000/- under Ex.b1 not for site No.6 alone but for both the items 1 and 6, when there was no such plea by the plaintiff; that it was not the case of either the plaintiff or the defendants 1 and 2 that the consideration of Rs.47,000/- under Ex.B1 was to be construed as one for site No.1 also; that from the evidence of P.W.1 and D.W.1, it can be inferred that the sale of site No.6 under Ex.B1 constituted a deviat ion from the terms contained in Ex.A1 agreement; that the trial Court has committed an error in observing that Ex.A1 did not contemplate the sale of sites Nos.1 and 6

together at one and the same time, without considering the evidence on record; that P.W.1 has admitted that Ex.A1 contained the stipulation that both the sites were to be purchased together at one and the same transaction; that it is the evidence of P.W.1 that at the time of Ex.B1 he consented for the sum of Rs.30,001/- being fixed as the rate per cent with the knowledge that the said rate differed from the one found in Ex.A1; that it is pertinent to note that the agreement under Ex.A1 was indivisible, and it was given a go-by by the plaintiff, and thus, the plaintiff was estopped from raising the plea of specific performance of a part of the agreement; that the plaintiff has relinquished his rights under the agreement, and therefore, the agreement became unenforceable and was no longer in force; that the plaintiff was not entitled to specific performance in respect of a portion of the properties mentioned in Ex.A1 as per S.18 of the Specific Relief Act; that if really P.W.1 had the wherewithal to purchase site No.6, he would have insisted on the executio n of the sale deed in respect of both sites; that it has to be noted that if really the plaintiff paid Rs.35,000/- towards purchase of site No.1, he would not have waited till November 1982; that the lower Court has not discussed both the pleadings and the evidence in order to give a finding on the issue as to whether the plaintiff abandoned his rights under Ex.A1; that the trial Court failed to consider the legal position that where the delay causes prejudice to the defendant and amounts to abandonment or waiver or acquiescence, specific performance should be refused; that the plaintiff who seeks equity must do equity, and in this case, the decree for specific performance would definitely result in oppression to the defendants and unconscionable advantage to the plaintiff; that though Ex.A1 contained a recital that possession was delivered to the plaintiff, in reality, possession was retained by the defendants 1 and 2 throughout; that the plaintiff has miserably failed to establish his claim for specific performance, and hence, the judgment of the trial Court has got to be set aside.

9. Countering to the above contentions, it was argued by the learned Senior Counsel Mr.R.Gandhi appearing for the first respondent/ plaintiff that the trial Court only on proper appreciation of evidence both oral and documentary has granted a decree in favour of the plaintiff; that it is pertinent to note that time was not and was never intended to be the essence of the contract between the plaintiff and the defendants 1 and 2; that the plaintiff has paid a total sum of Rs.35,0 00/- to the defendants 1 and 2 towards the suit transaction; that since site No.6 was sold to the third party, the plaintiff confined the suit to site No.1 only, and as such, there was an excess payment of Rs.7,310/-; that though the plaintiff has fully paid the sale consideration in respect of site No.1, the defendants 1 and 2 were postponing the execution of the sale deed; that it is pertinent to note that pursuant to the part performance of the contract, the plaintiff took possession of the suit property; that the plaintiff was always ready and willing to perform his part of the contract, but it was the defendants 1 and 2 who were evading execution, despite many demands by the plaintiff; that since there was an excess payment by the plaintiff, he is entitled for refund of the same; that the plaintiff by adducing satisfactory and acceptable evidence has proved his claim; that all the contentions raised by the appellant do not deserve acceptance by the Court, since the trial Court after careful consideration of the rival submissions and scrutiny of the evidence has come to a conclusion that the plaintiff is entitled to get the relief of specific

performance, and no illegality or infirmity is found in the judgment of the trial Court, and hence, the appeal has got to be dismissed.

10. This Court paid its full attention on the rival submissions made and on careful scrutiny of the available materials, is of the considered view that it cannot agree all or any one of the contentions put forth by the appellant's side.

11. Admittedly, the plaintiff and the defendants 1 and 2 entered into an agreement of sale on 25.12.1977 marked as Ex.A1, in respect of the plaint Schedule mentioned items 1 and 2 i.e. plots 1 and 6 measuring 11 cents 33 sq.ft. and 18 cents 278 sq.ft. respectively, wherein interalia it was agreed that the sale price was Rs.2,500/- per cent of land. It was also agreed under Ex.A1 that within two years from the date of the agreement, the said sale transaction should be completed. An advance of Rs.5,000/- which was part of the sale price, was received by the defendants 1 and 2 from the plaintiff. A further payment of Rs.20,000/- was received by the second defendant for himself and on behalf of the first defendant from the plaintiff on 23.11.1979, which was also endorsed on Ex.A1 agreement. It is also admitted by the defendants 1 and 2 that a sum of Rs.10,000/- was paid by the plaintiff to one Thiagarajan, an Advocate, who was the son of Subramaniam Chettiar, from whom the defendants 1 and 2 received an advance of Rs.10 ,000/- pursuant to an agreement of sale dated 1.9.1974. As stated above, the plaintiff pursuant to Ex.A1 agreement has paid sums totalling to Rs.35,000/-. During the currency of Ex.A1 agreement, plot No.6 one of the items found as the subject matter of Ex.A1 was sold by the defendants 1 and 2 in favour of one C.V.Subramaniam for a consideration of Rs.47,000/- on 5.12.1979 under Ex.B1 sale deed.

12. The specific case of the plaintiff, as could be seen from the averments in the plaint, is that though the sale agreement under Ex.A1 was entered into between the parties in respect of two plots viz. 1 and 6, the defendants 1 and 2 have subsequently sold plot No.6 in favour of the third party, and the plaintiff confined the suit for specific performance in respect of plot No.1 only; and that he has already paid Rs.35,000/- as stated above, and deducting the sale consideration of Rs.27,690/- for plot No.1, he has made excess payment of Rs.7,31 0/-, and hence, with interest amounting to Rs.2,614.50, the defendants should be directed to pay a sum of Rs.9,924.50. As could be seen from the available materials and submissions made by the learned Counsel for the appellant, though the defendants 1 and 2 have admitted the execution of Ex.A1 agreement, the receipt of part payment of Rs.35,0 00/- and the sale of plot No.6 in favour of the third party under Ex.B1, the defence put forth by the appellant was that since a part of the subject matter has been already sold under Ex.B1 sale deed, which fact was well known to the plaintiff, he cannot seek the specific performance of a part of the agreement, since the agreement was an indivisible one, and the plaintiff has given a go-by to the agreement; that the sale transaction of plot No.6 was arranged only by the plaintiff pursuant to which the defendants 1 and 2 executed a sale deed in respect of plot No.6 in favour of one Subramaniam; that the plaintiff retained Rs.35,000/- towards the moneys what he already paid to the defendants 1 and 2, and the defendants 1 and 2 received the reminder of Rs.12,000/- only, and thus, as per the agreement between the plaintiff and the defendants 1 and 2 at the time of Ex.B1 sale deed, the plaintiff has given up all his rights under Ex.A1 agreement, and hence, Ex.A1 agreement was no longer in force, and it has become unenforceable, and apart from all the above, the plaintiff was

never ready and willing to perform his part of the contract under Ex.A1, and hence, the request of the plaintiff was to be rejected.

13. It is quite evident from Ex.A1 agreement that two separate items with specific measurements viz. Plot Nos.1 and 6 were given as subject matter of sale. It is pertinent to point out that the sale price was agreed at Rs.2,500/- per cent of land, and thus, neither the aggregate sale price nor the total amount of sale consideration was fixed under Ex.A1. It is not in dispute that plot No.6 has been sold by the defendants 1 and 2 under Ex.B1 on 5.12.1979. It remains to be stated that the said plot No.6 is shown as a separate and distinct item in Ex.A1 sale agreement, and hence, the contention of the appellant' s side that a part of the subject matter has already been sold, and Ex.A1 agreement was one indivisible, and hence cannot be performed has no force. The court may hasten to say that there is no legal impediment for granting the relief of specific performance in respect of plot No.1, which is shown as a separate and distinct item under Ex.A1 agreement.

14. The next contention that at the time of Ex.B1 sale deed, the plaintiff retained Rs.35,000/- out of the sale consideration found under Ex.B1, agreeing to relinquish all his rights under Ex.A1 agreement cannot be accepted for more reasons than one. Concededly, plot No.6 was sold by the defendants 1 and 2 on 5.12.1979 under Ex.B1 a registered sale deed. A reading of Ex.B1 would reveal that the sale consideration was directly received by the vendors viz. the defendants 1 and 2 from the vendee viz. Subramaniam. No circumstance is placed before the Court by the appellant to go against the tenor apparent on the document. It is contended by the appellant's side that out of the sale consideration of Rs.47,000/-, Rs.35,000/- was retained by the plaintiff. In order to prove the same, the defendants have not examined the said Subramaniam, the vendee under Ex.B1 sale transaction. It is specifically averred in the written statement that the said sum of Rs.35,000/- out of the sale consideration of Rs.47,000/- under Ex.B1 was retained by the plaintiff, and the reminder of Rs.12,000/- alone was paid. Contrarily, D.W.1 has categorically admitted that the recitals found under Ex.B1 as to the payment of consideration by the vendee directly to the vendors viz. the defendants 1 and 2 were true. At this juncture it has to be pointed out that when the parties originally agreed in respect of sale of the said sites, they have entered into a written agreement under Ex.A1, and when a further payment of Rs.20 ,000/- was paid by the plaintiff, an endorsement was also made in Ex.A1; and that when an amount of Rs.10,000/- was paid to one Thiagarajan, the same was also paid by obtaining a receipt from him. Had it been true as contended by the defendants 1 and 2 that a sum of Rs.35,00 0/- was retained by or paid to the plaintiff, no doubt, the defendants 1 and 2 would not have made the payment without getting proper receipt therefor, while all the earlier transactions were reduced to writing as stated above.

15. The further contention of the appellant is that the said payment of Rs.35,000/- was made, since the plaintiff agreed that he would give up all his rights under the suit agreement. If so, on making such payment the defendants 1 and 2 would have certainly got back Ex.A1 agreement from the plaintiff. It is a matter of surprise to note that the defendants 1 and 2 never made any demand to get back Ex.A1 agreement from the plaintiff. It remains to be stated that Ex.B1 sale transaction has taken place on 5.12.1979, and the instant suit was filed by the plaintiff on 23.11.1982. It was urged by the learned Counsel for the appellant that the plaintiff has attested Ex.B1

sale deed and was also one of the identifying witnesses under the said document, and the same would indicate that the plaintiff had not only the knowledge of the sale transaction under Ex.B1, but also received the said sum of Rs.35,000/-, as contended by the appellant. Merely because the plaintiff was an attestor and an identifying witness as found under Ex.B1, it cannot be inferred that any part of the sale consideration as found under Ex.B1 was retained by or paid to the plaintiff. It was further contended by the learned Counsel for the appellant that while the plaintiff has paid more than the agreed consideration at the rate of Rs.2,500/- per cent of land in respect of plot No.1, he would not have waited for nearly two years for filing the instant suit, and this circumstance would indicate that he has received the said sum of Rs.35,000/- out of the sale consideration of Rs.47,000/- under Ex. B1. The Court is unable to see any force in this contention, in view of the specific pleading in the plaint that many demands were made on the defendants 1 and 2 for the execution of the sale deed and the evidence of the plaintiff as P.W.1 stating that they were quite often meeting, and four or five times demands were made, and he was on the fond hope that the defendants 1 and 2 would execute the sale deed in his favour. All the above would not only stand contra to the conduct of a reasonable man under the given circumstances, but also be indicative of the falsity of the defence stating that a sum of Rs.35,000/- was paid to the plaintiff. In the absence of any evidence to accept the payment of Rs.35,000/- by the defendants 1 and 2 to the plaintiff at the time of Ex.B1 sale deed, the plea of the appellant that the plaintiff received a sum of Rs.35,000/- agreeing to give up all his rights under the agreement has got to be rejected.

16. Equally the last contention putforth by the appellant's side that the plaintiff was never ready and willing to perform his part of the contract does not deserve any acceptance, since the plaintiff has already paid more than the consideration as agreed under Ex.A1 in respect of plot No.1, and thus, what remains to be done was the execution of the sale deed by the defendants 1 and 2. At this stage, the defendants cannot complain lack of readiness and willingness on the part of the plaintiff. As per the agreement between the parties under Ex.A1, the actual consideration what the plaintiff is expected to pay at the rate of Rs.2,500/- per cent of land in respect of plot No.1 measuring 11 cents 33 sq.ft. was Rs.27,690/-. Admittedly, the defendants 1 and 2 have received Rs.35,000/-, and thus, there was an excess payment made by the plaintiff. The trial Court has found that the defendants are liable to pay Rs.6,000/- to the plaintiff and rightly too. Thus, for all the reasons stated above, the Court is unable to see any merit in the contentions putforth by the appellant's side. The lower Court was perfectly correct in granting a decree for specific performance in favour of the plaintiff along with refund of Rs.6,000/-. The judgment of the Court below does not call for interference, and hence, the same is sustained.

17. In the result, this appeal suit is dismissed, confirming the judgment and decree of the lower Court. Time for payment of Rs.6,000/- is two months herefrom, and in default, Rs.6,000/- shall carry interest at 12% per annum from the date of expiry of two months till realisation. There shall be no order as to the costs.

Index: Yes
Internet: Yes

To:
The III Additional Subordinate Judge,
Coimbatore

nsv/